FILED
OCT 14 1997
CLERK

No. 97-491

In The
Supreme Court of the United States
October Term, 1996

RANDY RAY CLUTE, ... *Petitioner*,
vs.
STATE OF SOUTH CAROLINA, ... *Respondent*.

On Petition for Writ of Certiorari
To the South Carolina Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Does a court with original jurisdiction over a criminal offense violate a defendant's rights to a fair trial when the court permits the prosecution to introduce evidence of the defendant's prior conviction of a similar offense?

2. Whether a court, under *Jackson v. Denno*, must conduct a hearing on "voluntariness" and another separate hearing on "custody," when "custody" is just one of the factors a court reviews when determining "voluntariness?"

3. Does a court's admission of a videotape, including the audio portions, violate a defendant's rights against self-incrimination, when the videotape contains the defendant's non-*Mirandized* admissions?

4. Is a law enforcement officer required to give a defendant his *Miranda* warnings when the defendant is within the officer's care, custody and control?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review the claim that the admission of the Petitioner's driving record improperly attacked his character, where the failure to timely raise this objection constituted a procedural default under state law?

2. Does this Court lack jurisdiction to review the Petitioner's claim that the trial court did not determine the voluntariness of his statement, where his failure to obtain a ruling constituted a procedural default under state law?

3. Was the admission of the audio portion of a videotape of the Petitioner's field sobriety test harmless error, where the overwhelming evidence supported the verdict and he is visibly intoxicated on the tape?

4. Did the lower court correctly rule that the Petitioner was not "in custody" when he performed several field sobriety tests during a routine traffic stop?

TABLE OF CONTENTS

Petitioner's Questions Presented i

Respondent's Counter-Questions Presented i

Table of Contents iii

Table of Authorities v

Citation to Opinion Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Counter-Statement of the Case 3

How the Questions Were Raised Below 4

Reasons for Denying the Writ 7

A. The failure to timely object to the introduction of the driving record as alleged improper character evidence is an adequate and independent state law ground for denying certiorari review 7

B. The failure to obtain a ruling on the voluntariness of the Petitioner's statements from the field sobriety test is an adequate and independent state

law ground for denying certiorari review 9

C. The lower court correctly ruled that the audio portion of the videotaped field sobriety test was cumulative to the record and its admission harmless beyond a reasonable doubt 13

D. The lower court correctly ruled that the Petitioner was not in custody or entitled to *Miranda* warnings when he performed the field sobriety tests during the traffic stop 15

Conclusion 18

Appendix . . . . . *post*

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279 (1991) 13, 15

Berkemer v. McCarty, 468 U.S. 420 (1984) 15-17

Coleman v. Thompson, 501 U.S. 722 (1991) 9, 12

Estelle v. Smith, 451 U.S. 454 (1981) 14

Jackson v. Denno, 378 U.S. 368 (1964) . . . . . i, 10-12

Lego v. Twomey, 404 U.S. 477 (1972) 11, 12

Michigan v. Long, 463 U.S. 1032 (1983) 9, 12

Minnesota v. Murphy, 465 U.S. 420 (1984) 16

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . i, iv, 5, 10-13, 15-17

Oregon v. Elstad, 470 U.S. 298 (1985) 11

Pennsylvania v. Bruder, 488 U.S. 9 (1988) 16

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 13

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 11

Stansbury v. California, 511 U.S. 318 (1994) 16

State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995) 8

State v. Clute, ___ S.C. ___, 480 S.E.2d 85 (Ct. App. 1996) 1

State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989) 12

State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) 8

State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986), *rev'd on other grounds* 292 S.C. 133 (1987) . . 7

State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) 9

State v. Mitchell, 220 S.C. 433, 68 S.E.2d 350 (1951) 8

State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974) 10

State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993) 10

State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 9, 12

Withrow v. Williams, 507 U.S. 680 (1993) 11

Constitutional Provisions and Statutes

28 U.S.C. § 1257(a) 2

S.C. CODE ANN. § 22-3-540 (1989) 2, 7

S.C. CODE ANN. § 56-5-2930 (1991) 3, 14

S.C. CODE ANN. § 56-5-2940(1) (1991) 3, 7

U.S. CONST. amend. V 2, 10, 14

U.S. CONST. amend. XIV, § 1 . . . . . 2, 14

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The Respondent, State of South Carolina, submits that this Court should deny and dismiss the petition to review the judgment of the South Carolina Court of Appeals.

CITATION TO OPINION BELOW

The South Carolina Court of Appeals opinion dated October 8, 1996 is reported at ___ S.C. ___, 480 S.E.2d 85 (Ct. App. 1996), and is reproduced in PETITIONER'S APPENDIX ("PET. APP.") p. 1. On December 31, 1996, the Court of Appeals denied rehearing in an unpublished order. PET. APP. p. 19. The South Carolina Supreme Court denied

the petition for writ of certiorari on May 27, 1997 in an unpublished order. PET. APP. p. 18.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

1) The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law....

2) The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

3) S.C. CODE ANN. § 22-3-540 (1989), which states in pertinent part:

> Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days....

4) S.C. CODE ANN. § 56-5-2930 (1991), which states in pertinent part:

> It is unlawful for any person... who is under the influence of intoxicating liquors,... to drive any vehicle within this State.

5) S.C. CODE ANN. § 56-5-2940(1) (1991), which states in pertinent part:

> A person violating a provision of Section 56-5-2930, upon conviction,... must be punished in accordance with the following:... By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense.

COUNTER-STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 6, 1994, the State of South Carolina tried the Petitioner in the Georgetown County Court of General Sessions for second offense driving under the influence ("DUI"). On December 7, the jury found the Petitioner guilty as charged. The Honorable David H. Maring, Sr. sentenced the Petitioner to imprisonment for one year and a $3,000.00 fine, suspended upon ten days service time, the fine, and four years of probation.

The Petitioner appealed his conviction. Following briefing and oral argument, the South Carolina Court of Appeals affirmed the conviction on October 8, 1996. The Court of Appeals denied rehearing in an unpublished order dated December 31, 1996. The South Carolina Supreme Court denied its writ of certiorari in an unpublished order dated May 27, 1997.

B. STATEMENT OF RELEVANT FACTS

For the purpose of this *Brief in Opposition*, the Respondent incorporates the recitation of relevant facts from the opinion below. *See* PET. APP. p. 2.

HOW THE QUESTIONS WERE RAISED BELOW

A. PETITIONER'S OBJECTION TO THE ADMISSION OF HIS DRIVING RECORD.

Before trial, the Petitioner moved to dismiss the DUI charge because the State could not prove it was a second offense. The State responded that it would introduce a certified copy of the Petitioner's driving record to prove the second offense. The Petitioner then argued that state law required a certified copy of his actual conviction to prove the offense. Judge Maring denied this motion. When the State introduced the record in its case in chief, the Petitioner renewed his objection "as previously noted." RESPONDENT'S

APPENDIX ["RESP. APP."] at 210-480. After the State and defense rested, the Petitioner moved for a mistrial on the ground that the introduction of his driving record impermissibly placed his character in evidence. Judge Maring denied the mistrial. RESP. APP. at 490-580.

The Court of Appeals later ruled that the objection to the alleged character evidence was untimely and could not be "bootstrapped" to a mistrial motion. PET. APP. pp. 9-10. The South Carolina Supreme Court declined to review this holding on petition for writ of certiorari.

B. PETITIONER'S OBJECTION TO TESTIMONY ABOUT THE ROADSIDE FIELD SOBRIETY TESTS.

Before trial, the Petitioner moved to suppress the results of his roadside field sobriety tests. The Petitioner argued that since he was "in custody," Corporal Hess could not require him to perform the field sobriety tests without administering the *Miranda*[1] warnings. RESP. APP. at 100-200. Judge Maring rejected this argument as follows:

> I said he is not entitled to *Miranda* warnings unless he's under arrest, in custody. I don't know that there's much difference between being in custody and being under arrest, other than a warrant hasn't been signed. All right.

---

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

The Court's ruling is then he is not in custody for your purposes for appeal. (Emphasis added). RESP. APP. at 190.

The Petitioner did not ask for further clarification of this ruling. On appeal, the Petitioner challenged the ruling on the custody issue, and questioned Judge Maring's failure to decide the voluntariness of the statement. The Court of Appeals ruled that the Petitioner was not in custody during the field sobriety tests. The Court of Appeals also held that the Petitioner waived any challenge to the voluntariness of his statements because he did not obtain a specific ruling on the issue at trial. PET. APP. pp. 3-6. The South Carolina Supreme Court declined to review these holdings on writ of certiorari.

C. PETITIONER'S OBJECTION TO THE VIDEOTAPE OF THE FIELD SOBRIETY TESTS.

Judge Maring admitted the videotape of the field sobriety test over defense objections. Following the verdict, Judge Maring found that the admission of the audio portion of the tape was harmless error. On direct review, the Court of Appeals agreed that the Petitioner was in custody and did not receive his *Miranda* warnings when the field sobriety tests were taped. Therefore, the sound portion of the tape was inadmissible. The lower court further held that the

error was harmless in the context of the record and the Petitioner's obvious intoxication on the tape. PET. APP. pp. 6-8. The South Carolina Supreme Court declined to review this holding on writ of certiorari.

REASONS FOR DENYING THE WRIT

A. The failure to timely object to the introduction of the driving record as alleged improper character evidence is an adequate and independent state law ground for denying certiorari review.

The Petitioner argues that it was unnecessary for the State to prove jurisdiction of the second offense DUI charge because the trial court had concurrent jurisdiction under *State v. Leonard*, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986), *rev'd on other grounds* 292 S.C. 133 (1987).[2] The Petitioner asserts that the State used jurisdiction as a subterfuge "to get the prior conviction before the jury to

[2]South Carolina magistrates have exclusive jurisdiction over crimes "in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." S.C. Code Ann. § 22-3-540 (1989). First offense DUI carries a maximum fine of $200.00 and thirty days imprisonment. *See* S.C. CODE ANN. § 56-5-2940(1) (1991).

demonstrate he was a bad person and guilty of the pending charge." (Emphasis in original). PETITION ["PET."] pp. 8-14. The Petitioner wholly ignores his role in bringing the matter before the jury.

As the Court of Appeals noted, the Petitioner challenged the trial court's jurisdiction from the outset, and required proof that he committed a second offense.[3] The Petitioner first objected to the alleged character evidence after the State and the defense rested. Therefore, the Court of Appeals concluded that the objection was untimely under state error preservation rules. PET. APP. pp. 9-10.

South Carolina does not recognize a "plain error" rule. *State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388 (1995). Under state law, the defendant must contemporaneously object on specific grounds in order to

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[3]Under state law, an indictment for DUI second offense must allege the previous offense because the prior conviction is a substantive element of the offense. *State v. Mitchell*, 220 S.C. 433, 68 S.E.2d 350 (1951). If jurisdiction is disputed and the parties do not stipulate to the General Sessions Court's power to hear the case, the State may introduce the previous conviction with appropriate limiting instructions. *See State v. Anderson*, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). In this case, the Petitioner challenged the trial court's jurisdiction, but did not timely raise his character evidence objection or request limiting instructions on the use of his prior conviction.

preserve an exception for appeal. *Id.*, 319 S.C. at 236-37, 460 S.E.2d at 390-91. Furthermore, a defendant cannot cure his failure to make a timely objection to the admission of evidence by a later motion for a mistrial. *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981).

This Court lacks jurisdiction to review alleged violations of federal law by a state court where an adequate and independent state law ground supports the judgment below. *Michigan v. Long*, 463 U.S. 1032 (1983); *Coleman v. Thompson*, 501 U.S. 722 (1991). This rule applies regardless of whether the state law ground is procedural or substantive. *Coleman v. Thompson*, 501 U.S. at 729. Conversely, this Court will not review constitutional issues which the state court refused to consider because the defendant did not comply with state error preservation rules. *Id.*, 501 U.S. at 729-30; *Wainwright v. Sykes*, 433 U.S. 72 (1977). Therefore, since the lower court expressly relied upon the Petitioner's procedural default in refusing to consider his constitutional claims, this Court should not grant certiorari review of this issue. *Michigan v. Long*, *Id.*

B. The failure to obtain a ruling on the voluntariness of the Petitioner's statements from the field sobriety test is an adequate and independent

state law ground for denying certiorari review.

The Court of Appeals did not consider the Petitioner's argument that his statements during the traffic stop were involuntary because he only requested a ruling on the custody issue. PET. APP. pp. 5-6. Under state error preservation rules, a defendant must both object **and** obtain a ruling from the judge. *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974). Accordingly, if the trial court finds that a defendant was not "in custody" for *Miranda* purposes, the defendant must also obtain a ruling on the voluntariness of a statement to preserve the issue on appeal. *State v. Silver*, 314 S.C. 483, 431 S.E.2d 250 (1993).

The Petitioner now insists that the Court of Appeals applied an incorrect standard in rejecting his Fifth Amendment claim. The Petitioner asserts that the Court of Appeals improperly "created a **two (2) step** procedure for *Jackson v. Denno*[, 378 U.S. 368 (1964)] hearings <u>not</u> heretofore previously required by either this Court or the South Carolina appellate courts." (Emphasis in original). PET. p. 17. This argument has no merit, and does not warrant certiorari review by this Court.

Upon timely objection to the admission of a statement, the trial court must determine whether the statement was voluntary by a preponderance of the evidence.

Jackson v. Denno, *Id.*; *Lego v. Twomey*, 404 U.S. 477 (1972). The voluntariness of a statement depends on the totality of the circumstances of its making. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

As the Petitioner acknowledges, custody is simply one factor in determining whether a statement was made voluntarily. PET. p. 16. However, the ultimate question in a *Jackson v. Denno* hearing is whether the statement was coerced. *Lego v. Twomey*, 404 U.S. at 485, n. 12. "The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). Accordingly, a trial judge's ruling that a defendant was not "in custody" does not implicitly raise or resolve the voluntariness of the statement. *See Withrow v. Williams*, 507 U.S. 680, 695-96 (1993) [District court should not have reached voluntariness issue on federal habeas review, where petitioner only argued custodial nature of statement below].

The Court of Appeals correctly recognized that the Petitioner only argued the custodial nature of his statements to the trial judge. After Judge Maring ruled against the

Petitioner, **nothing** prevented him from seeking or obtaining a ruling on the voluntariness of the statements.[4] *See* RESP. APP. at 190.

Since the Petitioner did not obtain a ruling on this issue, he did not preserve his voluntariness argument for appellate review. The South Carolina Court of Appeals simply applied established state rules of error preservation in its decision; it did not create an "additional step" in resolving *Jackson v. Denno* issues.[5] Therefore, since the Petitioner's procedural default is an adequate and independent state law ground for sustaining the judgment below, this Court should not grant certiorari review of this issue. *Michigan v. Long*, *Id.*; *Coleman v. Thompson*, *Id.*

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[4]As noted by the Court of Appeals, there is no showing that the trial judge either refused to hold a *Jackson v. Denno* hearing or declined to rule upon the issue upon timely request. PET. APP. p. 5. The trial judge is not required to rule on the issue absent a request by counsel. *Wainwright v. Sykes*, 433 U.S. at 86.

[5]Even if the Court of Appeals created a two step procedure, this Court should not grant certiorari review. Under state law, the prosecution must prove the voluntariness of a statement by a preponderance of the evidence before the jury may consider it. *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989). Clearly, requiring the State to prove compliance with *Miranda* and voluntariness in separate hearings would benefit defendants rather than harm them. Furthermore, nothing in the constitution prohibits such a practice. "Of course, the States are free, pursuant to their own law, to adopt a higher standard." *Lego v. Twomey*, 404 U.S. at 489.

C. The lower court correctly ruled that the audio portion of the videotaped field sobriety test was cumulative to the record and its admission harmless beyond a reasonable doubt.

The Petitioner does not challenge his nontestimonial, physical actions on the videotape of the field sobriety tests at the police station.[6] Instead, the Petitioner argues that the erroneous admission of the sound portion of the tape denied him due process of law. PET. pp. 18-21. The South Carolina Court of Appeals correctly decided this issue against the Petitioner.

As the Court of Appeals noted, the improper admission of custodial statements obtained in violation of *Miranda* may be harmless error. PET. APP. pp. 6-8. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). A review of the facts relied upon by the lower court shows that the admission of the audio portion had no effect on the verdict:

> On April 23, 1994, Officer Hess of the Georgetown Police Department stopped Clute's vehicle after observing Clute driving erratically. Hess testified that when he approached the vehicle, he noticed a strong

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[6]A DUI suspect's physical characteristics are not testimonial and do not implicate *Miranda* concerns. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

> **odor of alcohol and Clute immediately stated, "I, I know I had to much."** Prior to arresting Clute and without reading him his *Miranda* rights, Hess had Clute perform a series of field sobriety tests. According to Hess, Clute failed the sobriety tests, includingthe horizontal gaze nystagmus test (HGN). Further, **Clute's eyes appeared glassy and there was a strong odor of alcohol about his person.** (Emphasis added). PET. APP. p. 2.

The uncontradicted evidence clearly showed that the Petitioner was operating a motor vehicle in this state while under the influence of intoxicating liquors. Additionally, the Petitioner blurted out that he had too much to drink **before** Hess spoke to him or performed the field sobriety tests.[7] Therefore, the State proved all of the elements of DUI without reference to the improper statements. *See State v. Townsend*, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996); S.C. CODE ANN. § 56-5-2930 (1991). Accordingly, the Court of Appeals properly concluded that the audio portion of the videotape did not affect the verdict.

Finally, the Court of Appeals correctly held that any error was *de minimis* in light of the Petitioner's obvious drunkenness on tape. Like a human pinball, the Petitioner

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[7]The Fifth and Fourteenth Amendments do not exclude volunteered statements that are not the subject of custodial interrogation. *Estelle v. Smith*, 451 U.S. 454 (1981).

literally bounced off the walls of the police station as he unsuccessfully attempted to walk a straight line. In light of the other substantial evidence of intoxication, no prejudice resulted to the Petitioner.[8] Therefore, this Court should not grant certiorari review of this issue. *Arizona v. Fulminante*, *Id.*

D. The lower court correctly ruled that the Petitioner was not in custody or entitled to *Miranda* warnings when he performed the field sobriety tests during the traffic stop.

The Petitioner argues that he was "in custody" for *Miranda* purposes during the initial stop because Corporal Hess "was clearly predisposed to arrest [him] for DUI...." PET. pp. 24-25. The Court of Appeals properly rejected this argument. PET. APP. pp. 3-5.

The *Miranda* warnings are not required if the defendant is not in custody or significantly deprived of his freedom. *Berkemer v. McCarty*, 468 U.S. 420 (1984). A

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[8]The record does not support the Petitioner's assertion that the jury could have concluded he was "merely ill or otherwise indisposed" without the audio portion of the tape. *See* PET. p. 20. The Petitioner did not testify at trial. As shown above, the only testimony in the record is that the Petitioner appeared intoxicated while he was in custody.

traffic stop, by itself, does not render a driver "in custody" because the incidental restriction on his movements is not comparable to a formal arrest. *Berkemer*, 468 U.S. at 439-41; *Pennsylvania v. Bruder*, 488 U.S. 9, 10 (1988). Furthermore, this Court has ruled that the performance of field sobriety tests following a routine traffic stop is not a custodial interrogation. *Berkemer*, *Id.*; *Bruder*; *Id.*

The Petitioner does not present any circumstances showing that the traffic stop was anything but ordinary. Instead, he asserts that his traffic stop became a custodial interrogation because he "believed" he was in custody and Corporal Hess had probable cause to arrest him for driving under the influence. PET. pp. 25-26. This assertion has no merit.

The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 324-25 (1994). Furthermore, the fact that an investigation has focused on a suspect does not require police to administer *Miranda* warnings unless the suspect is in custody. *Minnesota v. Murphy*, 465 U.S. 420 (1984). Even if an officer has

probable cause to arrest the driver for a traffic offense prior to any questioning,

> A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. *Berkemer*, 468 U.S. at 442.

Therefore, although Corporal Hess suspected that the Petitioner was intoxicated, his suspicions are irrelevant in an objective determination of custody.

As the South Carolina Court of Appeals noted, there was "nothing extraordinary about the circumstances surrounding the administration of the roadside field sobriety tests in this case...." PET. APP. p. 4. Corporal Hess merely asked the Petitioner a modest number of questions and asked him to perform a balancing test in a public area that was plainly visible to passing motorists. *See* RESP. APP. at 1-90. "Treatment of this sort cannot be characterized as the functional equivalent of formal arrest." *Berkemer*, 468 U.S. at 442. Therefore, Judge Maring and the Court of Appeals correctly found that the Petitioner was not entitled to *Miranda* warnings during the field sobriety tests. This Court should deny certiorari review of this issue.

CONCLUSION

For all of the foregoing reasons, this Court should decline discretionary review of this case.

Respectfully submitted,

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APPENDIX

INDEX

EXCERPTS FROM THE RECORD BELOW

HEARING ON CUSTODIAL NATURE OF STATEMENTS A-1

MOTION TO DISMISS AND SUPPRESSION HEARING A-6

ADMISSION OF THE PETITIONER'S DRIVING RECORD A-12

STATE RESTS A-13

DEFENSE RESTS A-13

MOTION FOR MISTRIAL A-13

MR. HILLIARD: Call a witness? Alan Hess.

ALAN HESS, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK (RUBY MOORE): State your name.

THE WITNESS: Alan Hess.

DIRECT EXAMINATION BY MR. HILLIARD:

Q: You are a corporal with the city police department. Is that correct?

A: Yes.

Q: All right, sir. You were employed in that regard back on April 23, 1994?

A: Yes, sir.

Q: And you arrested this defendant, Randy Ray Clute?

A: Yes, sir.

Q: All right, sir. How is it that you came to arrest Mr. Clute?

A: You, from the beginning or you just --

Q: Yes, sir, from the --

A: Okay.

Q: -- from the beginning?

A: I was traveling westbound on Front Street in the area of Cleland Street. I observed the defendant traveling south on Dozier Street making a right-hand turn onto Front Street in front of me. I observed him make a wide right hand turn, proceeded to the traffic light at Front and Fraser, turned left onto South Fraser Street. He made a wide left-hand turn. I proceeded to follow him southbound on 17. He crossed the center line several times. He changed lanes from that point in time. He went off the berm of the road. That's the side of the road closest to the sidewalk on several occasions. I activated my blue light and stopped him south of the Sampit River Bridge on a dead-end road, which is commonly known as Frontage Road. At that point in time I got out, identified myself.

Q: Prior to your asking him any questions or making any inquiry of him, what, if anything, did he say to you? Did he say anything to you when he got out of the truck, car?

A: Other than the fact that he knew that he had too much. That's the only thing he said.

Q: Can you be more specific about when you said, what, what were his exact words that you recall?

A: His exact words was, "I, I know I had too much."

Q: All right, sir, and at that point in time what happened?

A: I noticed a strong odor of an alcoholic beverage about him at which point I asked him to sep out so that I could administer some field sobriety tests.

Q: All right, sir, and then what happened.?

A: At which point after I felt that he failed his ABC's, I done a horizontal gaze nystagmus test on him at which point he failed that in my opinion. I had him stand a one-legged stand at which point he was staggering. He couldn't hold his balance at which point I, at that point in time I placed him under arrest for driving while under the influence.

[R. p. 9, line 1 - p. 11, line 6]

MR. JOYE: The second thing that I'd like to address is Mr. Hilliard says he knows of no authority that says you don't have to advise anybody of *Miranda* Rights until such time as they're placed under arrest. Well, *State versus Caulder*, I think, specifically says, citing United States Supreme Court case of *Rhode Island versus Innis* with approval, as verified by *State versus Newell*, that there are no degrees with regards to criminal activity, and if you're investigating suspected criminal activity, and the person is not free to clear, as *Sikes* says, "seized," then you have an obligation to advise them that you're investigating suspected criminal activity and that anything they say or do can and will be used against them, and I think that that's an affirmative duty, and unless the State could show that Mr. Clute knowingly, intelligently, and voluntarily waived those rights, which they've failed to do, then they should be suppressed.

I do not disagree that he had sufficient probable cause to stop him for some traffic violation. I'm just trying to, I'm just trying to think through the Code as to what, what violation it is, and unless the solicitor can enlighten me, I don't think it's a violation to make a wide turn. I don't think it's a violation to cross a lane divider, and I believe he testified that the berm -- I don't know what, what that was, still don't know what a berm is. I just think that, I mean, we, had he walked up to him and said, Your Honor, "I'm investigating suspected criminal activity. I think that you've had too much to drink to drive a car. Anything you say or do can and will be used today, but he didn't do that. I think it's undeniable that he did have a right not to say or do anything and that he's testified that he, that he at that time he didn't know, and had he known, he wouldn't have done anything, so they've got the burden under *Miranda* that he knowingly, intelligently, and voluntarily waived, and they failed to do. They've just taken the straight approach that nobody's entitled to *Miranda* Warnings on a routine traffic stop, and --

THE COURT: They're not entitled to it until they're under arrest.

MR. JOYE: Until he's under arrest.

THE COURT: That's right.

MR. JOYE: Yeah.

[R. p. 43, line 3 - p. 44, line 21].

THE COURT: All right. Then, and then you had a motion to, I assume, suppress any statements he may have made on the grounds that he had not been given his *Miranda* Warnings. I find that he was not under arrest.

MR. JOYE: I'm sorry. I did not hear that.

THE COURT: I find that he was not under arrest.

MR. JOYE: He was not under arrest?

THE COURT: That's right.

MR. JOYE: All right, sir.

THE COURT: And --

MR. JOYE: So may I ask --

THE COURT: -- since he was not under arrest, I don't think I really need to, to go into the specific findings. I would had he been under arrest and not been given his *Miranda* warnings.

[R. p. 45, line 12 - p. 46, line 1]

THE COURT: Well, let, let me rephrase. I said he's not entitled to *Miranda* Warnings unless he's under arrest, in custody. I don't know that there's much difference between being in custody and being under arrest, other than a warrant hasn't been signed. All right. The Court's ruling is then that he is not in custody for your purposes for appeal.

MR. JOYE: So that he was free to leave?

THE COURT: That's correct.

[R. p. 50, line 25 - p. 51, line 8].

MR. JOYE: Well, I don't have any evidence that they intend to use, you know, against my, I don't know what the evidence is, other than the, the, I mean, first off, this statement is a damning statement, quite frankly, and I think the Court has taken that position, and that was not furnished to me prior to the time that we've come to trial. The second thing is, is that, let's see, I don't know if the, I mean, I, the solicitor asked me to stipulate to the jurisdiction. I told him I would not. I don't have any evidence that this Court has jurisdiction. Your Honor, as I understand--

THE COURT: Was he indicted by the Grand Jury of this County on second offense driving under the influence?

MR. HILLIARD: More than first within the last ten years, your Honor.

THE COURT: Well, then that would give this Court jurisdiction. Of course, they've got to put testimony up if you don't want to stipulate.

MR. JOYE: But, but the defendant has the right anytime during the trial of a criminal case to contest jurisdiction, and that's what I'm doing.

THE COURT: Uh-huh (affirmative response).

MR. JOYE: He asked me to stipulate. I would not, so I'm moving now to dismiss on the basis that the State will be unable to prove jurisdiction. Now, let me clarify this a minute. Jurisdiction with regards to second offense. The Legislature changed the law where the, where the General Sessions Court has jurisdiction over first offense DUI. They did that three or four years ago. Otherwise, we would have been out of, out of court if they can't prove that this was a second, and so I'm challenging jurisdiction again in the interest of time before we start getting into the, into the trial. I think that, and I'm not sure of that, whether or not I have to challenge the jurisdiction before the jury is sworn. I mean, I could challenge it, but I didn't stipulate to it because they don't have any, I don't, they haven't furnished me any evidence that this is a second offense.

THE COURT: Okay.

MR. JOYE: I don't know how they're going to prove it, and I'm asking that they--

THE COURT: Motion to dismiss for lack of jurisdiction denied.

MR. JOYE: Okay.

[R. p. 52, line 13 - p. 54, line 8]

MR. HILLIARD: What I have, Your Honor, is a certified true and correct copy of the original document being a Certification for Court of the driving record of Randy Ray Clute, showing a driving under the influence conviction for 5-28-91, accompanying by, accompanied by

a certified true and correct copy of the official Order of Suspension indicating a violation of driving under the influence from April 27, 1991, that being the self-same and exact conviction that is on the certified driving record. The statute involved is 56-5-2980, Your Honor.

THE COURT: Right. Okay. That's the State's presentation?

MR. HILLIARD: Yes, sir.

THE COURT: All right.

MR. HILLIARD: Would you like to mark this as a Court's exhibit, Your Honor.

THE COURT: Let's mark it as Court's Exhibit 1.

MR. HILLIARD: Judge, we already have State's Exhibit No. 1 for Identification, that being the videotape.

THE COURT: Well, it would be 2 then, Court's Exhibit 2, I suppose, for purposes of this hearing.

MR. HILLIARD: Mr. Joye has stipulated, while we're here, Judge, Mr. Joye has stipulated as to the chain of custody in State's Exhibit No. 1 for Identification.

MR. JOYE: That is correct.

THE COURT: All right.

MR. JOYE: There is no contest with regards to the chain of custody, Your Honor.

(*Court's Exhibit No. 2* marked)

MR. JOYE: Your Honor, Mr. Hilliard has not advised the Court of all of the facts yet.

THE COURT: All right.

MR. JOYE: I assume, I thought he was, are you through?

THE COURT: Okay.

MR. HILLIARD: Yes, sir.

THE COURT: All right, sir.

MR. JOYE: A strict reading of the statute, Your Honor, that's what I'm relying on. 56-6-2980.

THE COURT: Go ahead.

MR. JOYE: 56-5-2980.

THE COURT: In what way do you think it's defective and not admissible under that section?

MR. JOYE: Sir?

THE COURT: In what way do you think it's defective and not admissible under that section?

MR. JOYE: Your honor, what Mr. Hilliard failed to tell you is, is that the conviction is a conviction reported from another state. It did not happen in South Carolina.

[R. p. 61, line 24 - p. 63, line 23].

MR. JOYE: The statute says that -- the statute was changed in 1992 -- as a result of the Supreme Court case that came out the first part of '92, and I believe was *State versus Breech*, that said you couldn't count them, so then the Legislature changed it and said you can count the, and then I believe there's the case of *State versus Tennyson* that said yes, so they, they reaffirmed the legislative act, but he's not, but, but what he's doing is he's talking about introduction of evidence under 56-5-2980, and he fails in his proof. He does not have a certified copy of a conviction nor is there one attached to that, and as I read it, there must be unless it occurred in this state. Statutes are supposed to be strictly construed against the State when they deal with criminal penalties.

THE COURT: The Court would make a finding it would be admissible.

MR. JOYE: Your Honor --

THE COURT: I note your exception.

MR. JOYE: Okay.

THE COURT: Okay.

MR. JOYE: Do you see the language that I'm talking about?

THE COURT: Yes.

MR. JOYE: And I'm just taking it as strict construction. It says, "True copies of the original on file thereof," and there is nothing attached to that --

THE COURT: Yes, sir.

MR. JOYE: -- showing that that's a certified copy of thereof and that the conviction that's reported there is a conviction that's reported in Louisiana.

THE COURT: All right, sir. Okay. Now, what I'm not trying to coerce you into stipulating at all. I do, I need, I need to know your position before we bring the jury in.

MR. JOYE: I don't mind stipulating in, to the extent that we don't waive because I think that, once again, I'm reading the law. As I read the law, they've got to have a certified copy of the conviction in order to, for it to be attached thereto.

THE COURT: No, you can't do, you can't do that because you have a right to put up evidence, and the solicitor has a right to put up any other evidence bearing on this being a second offense. It's admissible under our rules of evidence, so I don't think you could, you could --

MR. JOYE: Then I can't stipulate --

THE COURT: Okay.

MR. JOYE: -- if I end up waiving it.

[R. p. 64, line 23 - p. 66, line 19].

MR. HILLIARD: Let me show you State's Exhibit No. 2 for Identification and ask if you can identify that.

OFF. HESS: It's a certified copy of a driver's record.

MR. HILLIARD: All right, sir. Has that been requested by the police department?

OFF. HESS: That is correct.

MR. HILLIARD: And it appears here in court today by virtue of the police department?

OFF. HESS: Yes, sir.

MR. HILLIARD: We'd offer it into evidence, Your Honor.

MR. JOYE: Objection, as previously noted.

THE COURT: All right. Sustained, and the objection is continuing.

MR. JOYE: And we object to it, you know, coming in through this witness, but be that as it may.

THE COURT: All right.

MR. HILLIARD: So it's admitted, Your Honor.

THE COURT: It's in. It's in. Yeah, it's in evidence, over objection of counsel.

[R. p. 67, line 8 - p. 68, line 2].

THE COURT: All right. It's my understanding, Solicitor, the State has rested. Is that correct?

MR. HILLIARD: Yes, sir.

THE COURT: All right.

[R. p. 114, lines 8-11].

MR. JOYE: Your Honor, just for the record we move for a directed verdict at the close of the State's case on grounds previously stated. I think it would be waste of time to, to go into them, and we have no evidence that we intend to put up.

THE COURT: All right. Your, your motion is, for directed verdict is denied.

[R. p. 114, line 24 - p. 115, line 5].

THE COURT: All right. Motions?

MR. JOYE: My motion may obviate the necessity of having the jury come out. I'd move for a mistrial.

THE COURT: Okay.

MR. JOYE: Last night I kept, was concerned about something that Mr. Hilliard did at the beginning of the trial, and if I may state my grounds for mistrial, the grounds for the mistrial is, is in accordance with about thirteen or fourteen South Carolina cases that I could find on point, it is a reversible error to put before a jury evidence of a prior conviction; that in this state evidence of a prior conviction is admissible only for impeachment purposes. Since the defendant did not take the stand, it's impermissible to put to the jury the fact that he had a prior driving under the influence conviction.

Furthermore, the driving under the influence conviction would not be even be admissible for impeachment, unless it was a crime of moral turpitude, and it is not.

Historically, Judge, the reason why, as I understand it, the reason why you, you either waive or you stipulate or you, to jurisdiction, has to do with the fact that about, up until about four years ago, circuit court did not have jurisdiction over a driving under the influence first offense, and, therefore, if they didn't prove jurisdiction, then it would get dismissed on that technicality. When the Legislature changed the law, it became no longer necessary to "prove jurisdiction" because the Court has concurrent jurisdiction of the first offense just like magistrate's court does; so, therefore, I submit to you that it's error. I have a complete cite of cases starting with a 1923 case all the way up to the present time, and I'll be glad to, you know, cite

them for you for the record, but it's all in here. It's all in the computer. I mean, I spent two hours last night just pulling them up one right after the other.

The only reason why the solicitor would do it would be to prejudice the jury. I mean, he's got to show some motive, some intent, some absence of a State, common scheme, and I have, I mean, I, I'm satisfied that the Court is familiar with the, with cases, and, and I have to make a motion in the event, you know, the decision were to go adverse to me and be able to protect the record for appeal by moving for a mistrial on that issue.

THE COURT: All right. Motion is denied.

[R. p. 119, line 16 - p. 121, line 9].